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PRELIMINARY STATEMENT

The respondent, State of New Jersey, accepts the statements of Opinions Below, Jurisdiction, Questions Presented and Constitutional and Statutory Provisions Involved in the brief of the petitioner, except as supplemented or contradicted *infra*.

COUNTER-STATEMENT OF THE CASE

On September 29, 1967 the petitioner, John William Smith, moved to dismiss two indictments returned against him by the Grand Jury of Essex County, New Jersey, each of which indictments charged him with assault and battery upon a police officer contrary to the provisions of N.J.S. 2A:90-4. The basic ground for the defendant's motion was that the Grand and Petit Juries were improperly and unconstitutionally impaneled. More specifically, he claimed that the procedure employed by the Essex County Jury Commissioners in the selection of Grand and Petit Jurors resulted in a systematic and deliberate exclusion of Negroes, women, residents of the city of Newark and persons of lower economic status. Following extensive hearings and review of the applicable case law, the trial court concluded "that the practices and procedures employed by the jury commissioners in the selection of Grand and Petit Jurors is not violative of the Federal Constitution nor did such procedure point to a conclusion of discrimination towards any race or class of individuals". *State v. Smith*, 102 N.J. Super 325, 350 (Law Div. 1968).

The defendant was then tried on both indictments and convicted on one indictment on April 1, 1968. The jury was unable to reach a verdict on the other indictment. The defendant then appealed his judgment of conviction to the Appellate Division of the Superior Court of New Jersey. The New Jersey Supreme Court, however, certified such appeal before argument there. The New Jersey Supreme Court affirmed the defendant's conviction, indicating its agreement with the trial court's disposition of his argument in regard to the validity of the Grand and Petit Jurors by whom he was indicted and convicted. *State v. Smith*, 55 N.J. 476, 481 (1970). The New Jersey Supreme Court likewise considered and rejected the defendant's claim of prejudicial pre-trial publicity and the constitutionality of the statutory oath required of Grand and Petit Jurors. *Id.* at 481-82. The defendant now petitions this court for a Writ of Certiorari to the New Jersey Supreme Court to review the affirmance of his conviction. The respondent, State of New Jersey, submits that none of the reasons advanced by the defendant are sufficient to warrant this Court granting a Writ of Certiorari to the Supreme Court of New Jersey.

REASONS WHY WRIT SHOULD NOT BE GRANTED

POINT I

THE GRAND AND PETIT JURIES WHICH INDICTED AND CONVICTED THE DEFENDANT WERE PROPERLY AND CONSTITUTIONALLY IMPANELED.

It is the State's position that the trial court properly interpreted and applied the applicable judicial decisions of this Court to the facts before it and properly found that under-representation of the four groups cited by the defendant did not result from discrimination in violation of his constitutional right of due process. Analysis reveals that the cases relied upon by the trial court as well as other leading cases where discrimination in the selection of jurors was proven fall into three basic categories. First, those where the evidence established total or virtually total exclusion of an identifiable group within the community. Second, those where the evidence showed a substantial disparity between the total number of individuals within an identifiable group and their representation on jury panels (without regard to qualifications) when coupled with strong evidence pointing to the conclusion of discrimination. For example, evidence that there was either a long continued absence of Negroes on juries or utilization of a procedure allowing an opportunity to discriminate (such as a segregated tax digest from which jurors' names are drawn). Finally, those cases where the evidence showed such significant under-representation of a group, computed with regard to qualifications, as would necessarily point to discrimination. The petitioner's argument, however, is that a showing of mere disparity between the percentage of the total population of Essex County made up by an identifiable group at a given time and the percentage of the total number of Grand and Petit jurors made up by such identifiable group at such time makes out a *prima facie* case of discrimination, shifting the burden of proof to the State to come forward with sufficient evidence in rebuttal thereof. The petitioner's contention is without merit.

A. Proportional representation is not required.

The defendant in essence contends that the Essex County jury rolls do not represent a cross-section of the community and

that "the federal Constitution guarantees an accused 'due process and equal protection rights to an impartial jury representing a cross-section of the community'." (Pb10). He further alleges that "[t]he term cross-section 'means a very sample' of the community" (Pb10). These arguments are incomplete and misleading statements of the applicable legal precedents; when these statements are viewed in context, it is manifest that petitioner's contentions are without merit.

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates *an impartial jury drawn from a cross-section of the community . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, racial, religious, political, and geographical groups of the community; frequently such complete representation would be impossible.* But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. *Dow v. Carnegie-Illinois Steel Corp.* 224 F. 2d 414, 424 (3 Cir. 1955) (Emphasis Added).

This proposition has been reiterated in every case dealing with jury discrimination. A number of these cases are cited in *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), where this Court spoke as follows:

> " '[But] *the defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire of jury roll from which petit jurors are drawn.*' (Citations Omitted) Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a

> race and no discrimination because of color, proportional limitation is not permissible. (Citations Omitted) We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community underrepresented as much as ten per cent. 380 U.S. at 208, 85 S. Ct. at 829. (Emphasis Added)

A review of the trial court's opinion reveals that the court was guided by the correct principles of law as outlined above and properly applied them to the facts before it. *State v. Smith*, 102 N.J. Super 325, 245 (1968). Thus, the fact that the Essex County jury rolls might fall short of representing a sample or cross-section of the community has no bearing on the propriety of the trial court's determination that defendant did not establish a *prima facie* case of discrimination.

B. The trial court applied the correct standard of proof in concluding that defendant had failed to present sufficient evidence to support a prima facie case of discrimination in the selection of grand or petit jury panels.

From his review of *Whitus v. Georgia*, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967) and earlier cases the trial court concluded:

> "The defendant who asserts that there has been discrimination in the selection of the jury panel has the burden of proving it. (Citation Omitted). Once the movant establishes a *prima facie* case of discrimination, i.e., a significant disparity between those *qualified* for jury service and those of the group actually on the jury lists, the burden of proof shifts to the prosecution to explain this disparity." *State v. Smith, supra* at 346. (Emphasis Added)

Defendant alleges that the principles of law, as stated, are incorrect. Relying upon *Norris v. State of Alabama*, 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935), he argues that "[W]here the accused affirmatively shows a continuing pattern of substantial disparities between the size of identifiable groups within the community and their corresponding numbers on the jury lists, he has "made out a *prima facie* case of denial of equal protection." (Pb10,11) In other words, it is defendant's position that he need not show what percentage of the identifiable

group within the community were qualified as jurors, if any. Instead, he contends that the court must presume that all those within an identifiable group are qualified to serve as jurors. The State submits that the cases relied upon by defendant not only do not support him, but, in fact, reject his contentions.

In *Whitus v. Georgia, supra,* this Court held that the petitioner made out a *prima facie* case of discrimination by establishing a significant disparity between those *qualified* for jury service and those of the group actually on the jury list, thereby shifting the burden of proof to the prosecution to explain this disparity. In *Norris v. Alabama, supra,* the petitioner's proof was that Negroes constituted a substantial segment of the population, that some Negroes were qualified to serve as jurors and that *none had ever been called for jury service over an extended period of time.* In other words, petitioners evidence demonstrated a policy of total exclusion. In that context, the United States Supreme Court said that "the (State's) evidence failed to rebut the strong *prima facie* case which defendant had made. That showing as to the long-continued exclusion of Negroes from jury service, and as to the many Negroes qualified for that service could not be met by mere generalities" that no Negroes were qualified. *Norris* has absolutely no bearing on the case at bar. In Essex County, Negroes are not totally excluded from jury service. The same is true of *Patton v. State of Mississippi,* 332 U.S. 463, 68 S. Ct. 184, 92 L. Ed. 76 (1947) where petitioner urged that there were qualified Negroes in the county for jury service, and that no Negro had served on a criminal court grand or petit jury for a period of thirty years. In this context the Court in *Patton* and in other cases has held that it would be unreasonable to assume where Negroes were totally excluded from venires that this came about because all Negroes were unable to serve. The defendant's reliance on the above cases is misplaced as they do not support the petitioner's contention that the trial judge applied an incorrect standard of proof.

C. The trial court correctly concluded that defendant's statistical evidence was so unreliable as to be insufficient to support a prima facie case of discrimination in the selection of the grand and petit juries.

The trial court found that the procedure utilized by the jury commissioners in selecting grand and petit jury panels were constitutional on their face. Moreover, he found that there was absolutely no evidence presented to the court indicating that the jury commissioners had deliberately and systematically excluded Negroes or any other qualified group from jury panels. *State v. Smith*, 102 N.J. Super. at 350. The defendant does not really challenge these rulings, but instead argues that the trial court erred in concluding that there was not such significant under-representation on the jury lists of Negroes, women, residents of the City of Newark, and persons of lower economic status as would establish a *prima facie* case of discrimination. He contends that the statistical evidence presented to the court was sufficient to establish a *prima facie* case of discrimination, thereby rebutting the presumption of the validity of the jury panels. Defendant relies on *Whitus v. State of Georgia*, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967); *Swain v. State of Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965); *Scott v. Walker*, 358 F. 2d 561 (5th Cir. 1966); *Cassell v. Texas*, 399 U.S. 282, 70 S. Ct. 629 (1950); *Lebat v. Bennett*, 365 F. 2d 698 (5th Cir. 1966); *Coleman v. Alabama*, 389 U.S. 22, 88 S. Ct. 2 (1967); and *Sims v. State of Georgia*, 389 U.S. 404, 88 S. Ct. 523 (1967); and *Jones v. State of Georgia*, 389 U.S. 24, 88 S. Ct. 4 (1967). A review of these cases manifests that they are inapplicable to the factual situation in the case at bar. Moreover, they demonstrate that defendant's statistical proofs were insufficient to establish a *prima facie* case of systematic exclusion, intentional or unintentional, of any identifiable group within the community because they were compiled without regard to qualificiations.

In *Coleman v. Alabama*, *supra*, no Negro served on the grand jury which indicted or the petit jury which convicted petitioner. Up to the time of his trial, *no Negro ever served* on the grand jury and few, if any, Negroes had served on the petit jury panels. The court held that this testimony in itself made out a *prima facie* case of denial of equal protection. The court's conclusion rested on the fact that the evidence was tantamount to a demonstration of total exclusion of Negroes as in *Norris v. State of Alabama*, *supra*. See also *Patton v. State of Mississippi* *supra*. In *Lebat v. Bennet*, *supra*, the Court found that there was

a policy of systematic total exclusion of daily wage earners as a class. At 721. In the instant case there has been no total or virtually total exclusion of any identifiable group. In *Whitus v. Georgia, supra* jury selections were made from segregated tax digests which this Court held allowed for the opportunity of discrimination. Moreover, *no Negro had ever served* on a jury in the county and although the percentage of Negroes qualified because of inclusion in the tax digest was in excess of twenty-seven per cent, only nine per cent had been called for grand jury service and less than eight per cent for petit jury service. This Court, therefore, concluded that the opportunity to discriminate by use of the segregated tax digests had been utilized. In *Jones v. Georgia, supra* the facts were almost identical to those in *Whitus* and the court therefore rested its decision on *Whitus*. Again in *Sims v. Georgia* the opportunity to discriminate was available through the use of segregated tax digests and it was readily apparent that this opportunity was utilized. In the instant case the trial court found that there were no markings as to race, color or ethnic background on the source from which names were obtained. In addition, there had been no continued absence of Negroes on grand and petit juries. Clearly, there is nothing about the procedure employed in selecting jurors in the instant case which points to the conclusion of discrimination as in the cases cited by defendant.

In *Scott v. Walker, supra* the Court found that the evidence pointed to a systematic limitation of Negroes. However, the evidence showed that no more than one per cent of the Negro population were on a panel, although some thirteen per cent of their population were *qualified*.

It should be noted that in *Brown v. Allen*, 344 U.S. 443, 73 S. Ct. 397 (1953) petitioner offered no evidence to support a charge of limitation against the jury service of Negroes except the fact that fewer Negroes than whites, having regard for their proportion of the population, appeared on the jury panels. This Court held that it would not condemn good faith efforts to secure competent jurors merely because of varying racial proportions. 344 U.S. at 471-2, 73 S. Ct. at 415. In the instant case, defendant has shown no more than that certain groups within the community have lesser percentage participation on grand and petit juries than other groups, having regard for their

proportion of the population. Defendant has not established that the failure of the jury selection system to provide statistical perfection resulted from the systematic exclusion, intentional or unintentional, of any identifiable class or group of *qualified* persons in the community. The trial court was therefore correct in concluding that defendant had not sustained his burden of proof. *United States v. Bryant*, 291 F. Supp. 542 (Md. 1968).

POINT II

THE JURY COMMISSIONERS OF ESSEX COUNTY DID NOT DISCRIMINATE IN THE SELECTION OF GRAND JURORS AND PETIT JURORS EITHER BY AFFIRMATIVE ACTION OR A FAILURE TO ACT.

All those cases cited by the petitioner in support of his proposition that the Jury Commissioners failed in their affirmative constitutional duty to familiarize themselves with the composition of the Essex County Community and to insure constitutionally selected jurors involved situations where racial discrimination was patent. In *Cassell v. Texas*, 339 U.S. 282, 70 S. Ct. 629, 94 L. Ed. 839 (1950) not more than one Negro served on each of 21 consecutive grand juries over a five and one half year period. In *Smith v. Texas*, 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84 (1940) only three Negroes served on grand juries over an eight year period. In *Neal v. Delaware*, 103 U.S. 370, 26 L. Ed. 567 (1881) no colored citizen had ever been summoned as a juror in the courts of the State of Delaware. In addition, in both *Cassell v. Texas* and *Smith v. Texas* the jury commissioners involved testified that they were not personally acquainted with any Negroes and that they chose jury men only from those people with whom they were personally acquainted. *Cassell v. Texas, supra*, 339 U.S. at 278, 70 S. Ct. at 632, 94 L. Ed. at 847. The Essex County Jury Commissioners did not fail in any affirmative duty to familiarize themselves with the county community under the evidence presented below. Assuming *arguendo* that they did fail in such duty and under-representation of Negroes and other groups has resulted, there was no evidence below to support the premise that such result has been caused by discrimination of the kind encountered in *Cassell v. Texas, Smith v. Texas* and *Neal v. Delaware*. See *Cassell v. Texas, supra*, 339 U.S. at 288-89, 70 S. Ct. at 632-33, 94 L. Ed. at 848. Thus, the petitioner's contention when placed in context under the above cases is without merit.

POINT III

THE PETITIONER'S CONTENTION THAT THE TRIAL COURT'S REFUSAL TO GIVE PETITIONER PHYSICAL POSSESSION OF MORE THAN FOUR GRAND AND PETIT JURY MASTER LISTS OPERATED TO RESTRICT HIS JURY STUDY IS TOTALLY WITHOUT MERIT.

The Grand and Petit Jury lists to which the petitioner refers under his Point III are a matter of public record, open to the examination of any citizen who desires to view them. Such lists are kept in the Essex County Clerk's Office. It is significant to note that in this regard the petitioner makes no citation whatsoever to the transcript of proceedings below. In the absence of evidence showing that the petitioner was actually deprived access to the jury lists in question, the defendant's contention that physical possession of such jury lists was necessary for his jury study without more explanation lacks merit.

POINT IV

THE DENIAL OF THE PETITIONER'S CLAIM THAT ADVERSE PUBLICITY DENIED PETITIONER AN IMPARTIAL GRAND JURY DOES NOT PRESENT A BASIS FOR CERTIORARI UNDER THE FACTS OF THIS CASE.

The defendant's contention in this regard was raised before the trial court and rejected. The respondent relies upon the trial court's opinion, finding no evidence in the record to support the petitioner's contention. *State v. Smith*, 102 N.J. Super at 338-39. (Pa 27, 28).

POINT V

THE TRIAL COURT'S DENIAL OF THE PETITIONER'S CLAIM THAT THE GRAND AND PETIT JURY LOYALTY OATHS DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHTS DOES NOT PRESENT A BASIS FOR CERTIORARI UNDER THE FACTS OF THIS CASE.

The petitioner's contention in this regard was again raised before the trial court and the New Jersey Supreme Court, both of which rejected it. The respondent relies upon the opinion of the New Jersey Supreme Court, 55 N.J. 476, 482 (Pa 7) as well as the opinion of the trial court, 102 N.J. Super at 332-337 (Pa 21, 26), finding that the petitioner lacks standing to challenge such oaths and, assuming he does possess standing, such oaths are constitutional.

CONCLUSION

For the foregoing reasons the respondent, State of New Jersey, submits that a petition for a Writ of Certiorari to the Supreme Court of New Jersey should not be granted.

Respectfully submitted;

JOSEPH P. LORDI
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